X v Staatssecretaris van Financiën

X v. Staatssecretaris van Financiën: **a step forward in a proper application of the ability-to-pay principle in cross-border situations?**

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Introduction

Cases of taxpayers who receive the major part of their income in Member States other than the Member State of tax residence, and thus being denied tax advantages relating to their personal and family circumstances, have been "flocking" before the CJEU since the landmark 1995 *Finanzamt Köln-Altstadt v Schumacker* (*Schumacker*) ruling.[1] These have been considered on the grounds of possible infringement of the free movement of workers or of the freedom of establishment. Every case offers the CJEU the occasion to deal with additional aspects which were not brought to its scrutiny in previous rulings. This note discusses the most recent case, *X v. Staatssecretaris van Financiën (X),*[2] in the context of previous CJEU's decisions,[3] as regards both the criteria used in assessing such cases and the ultimate objective pursued by the CJEU.

From this twofold perspective, *X* may mark a step forward in the proper assessment of the ability-to-pay of taxpayers receiving cross-border income.

The factual circumstances and the legal background

A Dutch national was tax resident and owner of a dwelling in Spain during the relevant tax years. His income consisted of payments by two companies in which he held majority shareholdings, one of which was established in the Netherlands, the other in Switzerland. The income from the Dutch

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[1] *Finanzamt Köln-Altstadt v Roland Schumacker* (C-279/93) [1995] ECR I-225 [1995] STC 306.

[2] *X v. Staatssecretaris van Financiën* (C-283/15) [2017] ECR I-00000, decision issued February 2017.

[3] After the landmark *Schumacker* (C-279/93) case, above fn.1, [1995] STC 306 at [32] and [36]; amongst subsequent rulings, inter alia: *Gschwind v Finanzamt Aachen-Außenstadt* (C-391/97) (*Gschwind*) [1999] ECR I-5451; [2001] STC 331 at [27]; *Zurstrassen v Administration des contributions directes* (C-87/99) (*Zurstrassen*) [2000] ECR I-3337; [2001] STC 1102 at [21]; *de Groot v Staatssecretaris van Financiën* (C-385/00) (*de Groot*) [2002] ECR I-11819; [2004] STC 1346 at [89] and [90]; *Luxemburg v Lakebrink* (C-182/06) (*Lakebrink*) [2007] ECR I-6705; [2008] STC 2485 at [29] and [30]; *Renneberg v Staatssecretaris van Financiën* (C-527/06) (*Renneberg*) [2008] ECR I-7735 at [61].

source represented 60% of his overall taxable income, the income from the Swiss source represented 40% and he received no income in Spain. Under the applicable bilateral tax conventions (DTCs), the income from the Swiss source was taxed in Switzerland, and the income from the Netherlands source was taxed in the Netherlands. Netherlands tax legislation granted Dutch taxpayers resident in other Member States, and spending only part of the calendar year in the Netherlands, the option to elect to be subject to the tax regime applicable to resident taxpayers. Under this regime, income tax payable by individuals in the Netherlands includes a notional "income from residence", consisting of deemed "advantages" of being owner of an occupied welling, against which taxpayers can set specific expenses. If the amount of those expenses exceeds the value of the "advantages", taxpayers end up with a "negative income from residence" reducing their overall taxable income. The taxpayer, on choosing to be subject to this regime, was subject to unlimited tax liability in the Netherland and was allowed to deduct the "negative income from residence" relating to his dwelling located in Spain, but this choice proved to be unfavourable. In fact, he ended up being liable to a tax greater than that which he would have had to pay if he had been permitted to deduct in its entirety the "negative income" arising from his dwelling located in Spain from Dutch income *without* opting to be treated in the same way as resident taxpayers.

The taxpayer claimed that this tax treatment was contrary to free movement provisions - although without specifying which fundamental freedom was invoked - and that these should be interpreted as meaning that a non-resident taxpayer may obtain the deduction of "negative income" relating to the dwelling owned by him without being compelled to elect to be treated in the same way as resident taxpayers.

The transposition of the *Schumacker* principle to self-employed taxpayers

The CJEU, after placing the case at stake within the ambit of the freedom of establishment under Art. 49 of the Treaty on the Functioning of the European Union (TFEU), started with a dual assertion. First, it stressed that "negative income" relating to immovable property located in the Member State where a taxpayer is resident, forms a tax advantage linked to his/her personal situation, which is relevant to the assessment of his overall ability to pay tax.[4] Secondly, it acknowledged that the non-resident taxpayer is put at a disadvantage, in comparison with resident taxpayers, to the extent that he is not allowed to deduct the "negative income". The attention to the taxpayer's cross-border situation, with regard to his overall ability-to-pay, was therefore the starting point of the EU's reasoning.

[4] X case, above fn 3, para. 26

The CJEU then reiterated its *Schumacker* statement according to which different treatment between residents and non-residents is not generally discriminatory due to the non-comparability of situations – the resident usually derives most of his income from that member state, in contrast to the non-resident.[5] Each is in an objectively different situation.[6] The CJEU also reiterated that discrimination between a resident and a non-resident could arise only if, having regard to the very purpose and contents of national provisions at stake, each is in a comparable situation. This would be the case if the non-resident received insufficient income in either State to get the benefit of provisions intended to take into account of personal and family circumstances.[7]

The CJEU then adapted *mutatis mutandis* the principles developed in relation to employees under the free movement of workers to self-employed taxpayers in relation to freedom of establishment. It noted the two cumulative conditions required for comparability with residents set out in *Schumacker*, i.e. the non-resident obtains the major part of income in the work State and the resident State is unable "to grant him the advantages which accrue from taking into account his aggregate income and his personal and family circumstances".[8] The conditions were both satisfied. However there was another factual difference between the situation in *Schumacker* and the current case. In *Schumacker*, the taxpayer earned almost all his income in the non-resident state which refused him the tax advantage. In this case, he only received 60%. However the CJEU held that the important point was the fact that the residence State was unable to give relief because the taxpayer did not receive any income in this State. As a consequence, the CJEU, by applying the principle set out in *Schumacker,* found that the non-resident taxpayer faced discrimination as his personal and family circumstances were taken into consideration in neither the State where he earned 60% of his overall income nor the residence State. The decisive criterion is whether it is impossible for a Member State to take into account the personal and family circumstances of a taxpayer in the absence of sufficient taxable income, although such circumstances can otherwise be taken into account when there is sufficient income.[9]

So, in the first part of its ruling, the CJEU has applied the criteria for establishing the comparability between residents and non-residents that it had earlier applied in *Schumacker* to the case of non-resident self-employed people, an approach which has been referred to as the "*overall approach*" or "*always somewhere approach*".[10] After *Schumacker*, the CJEU has followed this approach in a

[5] X case, above fn 3, para. 27-31
[6] Id.
[7] X case, above fn 3, para. 34

[8] X case, above fn 3, para. 36-38.
[9] X case, above fn 3, para. 39-43.
[10] E.g., B.J.M. Terra, P.J. Wattel, *European Tax Law*, 6th edn. (Alphen aan der Rijn: Wolters Kluwer, 2012), 906–910; P.Wattel, *Fiscal Cohesion, Fiscal Territoriality and Preservation of the (Balanced) Allocation of Taxing Powers; What*

number of rulings dealing with situations where a non-resident earned all or almost all of its income in the State of employment.[11]. So here, the CJEU finding can be regarded as consistent with previous case-law, both in its analysis of "negative income from residence" as being a relevant type of tax advantage (falling within the scope of the *Lakebrink* ruling[12]) aimed at taking into account circumstances affecting the overall ability to pay and, in its treatment of applying the freedom of establishment to self-employed people in equivalent fashion to the free movement of workers for employees.

The pro-rata granting of personal deductions

However, in the second part of the opinion, the CJEU dealt with an new important aspect of the obligation to grant tax advantages related to personal and family circumstances: how much relief does the state have to give? For example, if the source state and the residence state (or two non-resident states) both have domestic rules which essentially give the same relief, the taxpayer could end up with a double deduction if he had sufficient income in each state. Should the source state be required to give less than a full deduction? The CJEU found that the obligation to take into account personal and family circumstances needs to be proportionately allocated between different "Member States of activities"[13] in relation to the amount of taxable income in each state. [14] So in this case, the Netherlands was required to give relief for 60% of the tax advantage. The CJEU's view was that the freedom, subject to EU law, of Member States,

> "to allocate among themselves their powers to impose taxes, in particular to avoid the accumulation of tax advantages, must be reconciled with the necessity that taxpayers of the Member States concerned are assured that, ultimately all their personal and family circumstances will be duly taken into account, irrespective of how the Member States concerned have allocated that obligation amongst themselves."[15] [16]

In stating the need to achieve this reconciliation, the CJEU noted,

> "Were such reconciliation not to take place, the freedom of Member States to allocate the power to impose taxes among themselves would be liable to create inequality of treatment of the taxpayers concerned which, since that inequality would not be the result of disparities between the provisions of national tax law, would be incompatible with freedom of establishment (see,

is the difference ? in D.Weber (ed.), The Influence of European Law on Direct Taxation, 139-157, at 154, Kluwer Law International, 2007.

[11] E.g., *Lakebrink* (C-182/06), above fn 2, at [29]; *Renneberg* (C-527/06) above fn 2, at [61].

[12] *Lakebrink* (C-182/06), above fn 2, at [34].

[13] "Member state of activities" was understood as meaning the member state which had the power to tax : X case, above fn 3, para. 45.

[14] Id, para. 48

[15] X case, above fn 3, para. 47

[16] Para 47

to that effect, judgment of 12 December 2013, *Imfeld and Garcet*, C‑303/12, EU:C:2013:822, paragraphs 70 and 77). [17]

This suggests that disadvantages caused by disparities between national laws cannot be removed by the CJEU, although inequality of treatment deriving from the failure to grant full tax advantages must be addressed The CJEU, by insisting on the word "reconciliation", appears to mean that two objectives must be simultaneously achieved: on the one hand, ensuring taxpayer's right to get 100% of the available deductions for personal and family circumstances (which right trumps Member States' freedom); on the other hand, ensuring that these deductions are not duplicated (i.e., that the taxpayer does not obtain, in the two jurisdictions considered together, more than 100% of deductions for the same personal and family circumstances).

As noted in the above quote, the CJEU referred to its previous decision in *Imfeld and Garcet*. In this case, the Court required the residence state to give full relief for personal and family circumstances, even if the taxpayer also received relief from the state of source and thus received a double tax advantage. This double advantage had to be tolerated as it resulted from the parallel application by two Member States of their tax laws, as agreed in DTCs between themselves.[18] In *Imfeld and Garcet* , the CJEU appears to have accepted the opinion of the Advocate General that the CJEU lacks competence to coordinate national tax systems in order to prevent double tax advantages.[19] In *X*, however, the disadvantage was caused by discrimination, not disparity. The quoted CJEU's wording would seem to imply that, if a taxpayer in a cross-border situation suffers an inequality of treatment only because the law of the involved countries is different, that disparity is admissible. However, such wording would also seem to imply that, if the taxpayer suffers an inequality of treatment because the disparity between the law of the involved countries causes a discrimination (i.e, causes a situation where the taxpayers benefits from full deductions nowhere), that disparity is no longer admissible and the reconciliation between the two objectives must take place.

The CJEU seemingly made, in the quoted wording, this distinction between two categories of disparities. Nevertheless, it can also be noted that *all* disparities derive, in practical terms, from the lack of coordination between national laws, and that Member States can coordinate with each other by allocating taxing powers among themselves for the purpose of preventing the accumulation of tax advantages too.

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[17] *Guido Imfeld and Natalie Garcet v. Belgian State* (C-303/12) (*Imfeld and Garcet*) [2013] ECR I-822, para. 70
[18] Id., para. 78
[19] Id., Opinion of the Advocate General, para 83, 84 and 85.

The end result is that a situation which was *tolerated* in *Imfeld and Garcet* – i.e. a situation where the taxpayer accumulates double tax advantages due to a DTC *failing* to allocate to one Member State alone the responsibility to grant deductions – was seemingly regarded as *unacceptable* in *X*, due to the CJEU stressing the freedom of Member States to allocate taxing power (specifically) with a view to *prevent* the accumulation of tax advantages.

So, as noted earlier, the CJEU in *X* ruled that the only possible method of achieving this twofold goal of protecting the freedom of member states and of respecting personal and family reliefs was to permit the taxpayer a claim in each Member State of activity (assuming that the State grants that type of relief or advantage), *in proportion* to the share of his income *received* within each such Member State.[20] In this respect, it also specified that the taxpayer needs to provide to the competent national authorities all the information on his global income needed by them to determine that proportion. In *X* the CJEU fully accepted, therefore, the *pro-rata* granting of tax advantages related to personal and family circumstances by all Member States having the power to tax income, from the activities of a non-resident self-employed taxpayer, received within the territory of each jurisdiction, irrespective of where the activities are actually performed.

Furthermore, the CJEU noted stated that, in the event that the non-resident taxpayer receives part of his income in a non-Member State (as he did here) and receives no income in his residence state (as he did here), this makes no difference to the proportionate allocation. It noted the irrelevance of the receipt of third country income to the non-discrimination obligation imposed on Member States under the TFEU's provisions on the freedom of establishment.

Finally, the CJEU declined to deal with a further question raised by the referring court. This was whether the responses concerning the proportional granting of deductions would still apply if the residence State gave a similar tax relief. The CJEU declined to deal with this question, simply by repeating that X received no income in Spain during the tax years at stake, and that – accordingly – he had no taxable income. The question was hypothetical and as such inadmissible.[21]

Nevertheless, this unanswered question would be relevant to the case where a Member State taxes the worldwide income of his tax residents (as is often occurs for individuals). Here the residence State *would* be able to give a similar tax relief because it would consider the foreign income as taxable income. This is discussed further in the next section.

Toward a European ability-to-pay principle?

The *pro-rata* granting of personal and family tax had been previously rejected, in principle, in *De Groot*.[22] So, has the CJEU changed its ultimate objective in relation to the consideration of the cross-border ability-to-pay of the concerned taxpayers? Commentators had already raised the issue as to whether the CJEU could impose a proportional application of the ability-to-pay principle,[23] by requiring the proportional granting of deductions for personal and family circumstances in home and

[20] Id, para. 48

[21] X case, above fn 3, para. 54 and 55.

[22] *De Groot* fn 2.

[23] F.Vanistendael, *Ability to pay in European Community Law*, 23 EC Tax Review 121-134, 134 (2014)

host states.[24] Accordingly, it could well be questioned whether, in *X*, the CJEU has incorporated a proportional application of the ability-to-pay principle in the *acquis communautaire.*[25]

De Groot concerned a Dutch resident who earned more than 60% of his total employment income in three other Member States and obtained personal deductions in none of them. The Netherlands disallowed a proportion of Dutch personal deductions, corresponding to the proportion of non-Dutch income to overall income and the CJEU found that this disallowance created a restriction to the free movement of workers under Art 45 of the TFEU. There had been no undertaking by the states of employment to grant these deductions either by virtue of their domestic law or under a DTC with the residence State.[26] A Dutch attempt to claim a justification for this on the basis that it would have been disproportionate in terms of tax loss to place the obligation to grant all personal allowances on the residence State in the absence of allowances granted by the source State was rejected by the CJEU on the ground that a loss of tax revenues can never justify restricting a fundamental freedom.[27] Ultimately, in *De Groot,* the ECJ made the proportional restriction of personal deductions by the residence State conditional upon some relief being granted by each source state (under a DTC *or* under national law). In *De Groot* the CJEU had, therefore, upheld the "always somewhere approach" as regards the ultimate objective to be achieved, i.e. in respect of the granting of full deductions linked to personal and family circumstances. To this extent, the *X* ruling can thus be seen as fully consistent with *De Groot*.

Nevertheless, the situations in *De Groot* and *X* are considerably different. In *De Groot*, the taxpayer was complaining about his treatment at the hands of his state of residence and this state had taxing powers on an amount of income that would have allowed this jurisdiction to grant the deductions. This means that the disadvantage suffered by the taxpayer falls within the category of a restriction, whereas in X, the disadvantage was caused by discrimination. As a result of this difference between the situations at stake in De Groot and in X, in *De Groot* the proportional granting of personal deductions was (unsuccessfully) advocated by the concerned national Government, whereas in X it was *unconditionally* requested by the CJEU. In *X,* the proportional granting was regarded as the *only* possible method of achieving two important objectives.

But why should it matter whether there is a restriction or discrimination? These two objectives (to prevent the improper accumulation of tax advantages on the one hand, and to ensure that all deductions for personal and family circumstances are granted on the other) are both instrumental to a *proper assessment* of the ability-to-pay. Such an assessment would seek to prevent both un underestimation of the ability to pay (which would occur if the taxpayers enjoyed full deductions for the same personal circumstances in two jurisdictions) and an overestimation of the ability to pay (which would occur if the taxpayer was refused a deduction by both countries).

The accumulation of tax advantages had been regarded as tolerable by the CJEU in *Imfeld and Garcet,* in essence, due to its lack of competence for coordinating national tax systems in the absence of an agreed allocation of the granting of tax advantages to only one of the two jurisdictions.[28] Conversely, in *X,* the CJEU showed awareness that the accumulation of tax advantages would prevent a proper assessment of the ability-to-pay when it indicated the need to ensure Member States' freedom

[24] Vanistendael, above fn XX, 134.

[25] As suggested by F.A. Garcia Prats, *Revisiting Schumacker: Source, Residence and Citizenship in the ECJ Case-Law on Direct Taxation*, in I.Richelle, W.Schon & E.Traversa (ed.), Allocating Taxing Powers within the European Union, Springer, 2013, 23.

[26] Garcia Prats, above fn xx,at 101 and 102.

[27] Garcia Prats, above fn xx,at 103.

[28] See H.Niehsten, *Growing impetus for harmonization of personal and family allowances: current state of affairs of the Schumacker –doctrine after Imfeld and Garcet*, in EC Tax Review 4, 2015, 185-201, at 194; A.Pace, *Cross-Border Family Fiscal Aspects in the Full Potential Impact of ECJ Case-Law,* in Rivista Trimestrale di Diritto Tributario 1, 2017.

to allocate taxing power *in particular* to avoid the accumulation of tax advantages. Furthermore it did so without verifying whether the concerned jurisdiction had *actually* prevented this accumulation when allocating taxing powers between themselves.

Accordingly, *X* appears to have taken a key step forward compared with both *De Groot* and *Imfeld and Garcet* towards allowing a proper assessment of the ability-to-pay of individuals in cross-border situations. This might also imply a step forward towards the development, ultimately, of an *EU law principle of ability-to-pay.*[29] The essence of this principle would consist of matching fractional taxation of the overall income by Member States with fractional granting of the entire tax advantages. The residence state would lose its right to tax world-wide income, but would only be required to give proportionate reliefs. This solution has been advocated by academic literature, not only in relation to personal tax reliefs but regard to issue of cross-border corporate losses set-off as well.[30]

What if the resident state adopts worldwide taxation?

The definition of "Member State of activity" adopted by the CJEU may potentially undermine the application of the ability to pay principle. As noted earlier, this was used by the CJEU as meaning a state in which there is taxable income a right to tax, rather than any actual taxable activity. The question arises as to whether or not the residence state operating worldwide taxation has to grant proportionate tax advantages even though the taxpayer performs no activity and gains no income in its territory. Neither this, nor the possibility of a tax residence conflict, were mentioned in *X*.

Assuming a residence state taxing on a worldwide basis, where the taxpayer has no domestic income, it is not obvious under *X* how to apportion the granting of reliefs between the various states. However, bear in mind that, in X, the Court noted "that that reconciliation can be achieved only by" proportionate granting of reliefs. Perhaps apportioning reliefs should not apply where there is another way to take into account personal circumstances. Any residence state taxing on a worldwide basis should have all the information necessary to assess the overall ability to pay and of course would have taxing power on foreign income too, This gives raises the question, firstly, whether the residence State should grant full deductions or proportional deductions, and, secondly, whether the proper assessment of the ability to pay (in terms of prevention of both underestimation and overestimation of the ability to pay) would also be compromised in case of tax residence conflict.

As regards the first question, it can be noted at the outset that, if the residence State applies the worldwide taxation principle, this jurisdiction (unless adopting the exemption method to eliminate double taxation) has taxing powers on foreign-sourced income, and it would be able to assess this income - thanks to the automatic information exchange under Art. 8 of the Administrative

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[29] The only exception to this outcome would arise where part of total income is received from extra-EU countries. Such countries would not be under an obligation to grant proportional of personal advantages. This means that the matching between the fraction of income received and the fraction of tax advantages granted would only exist for the overall share of the total income received within the EU.

[30] K.Van Raad, *Fractional Taxation of Multi-State Income of EU resident individuals, A Proposal*, in K.Andersson, P.Meltz &. C. Silfverberger (eds), Liber Amicorum Sven-Olon Lodin 211-221 (Kluwer, 2001); M.Mossner, *Source v. Residence – an EU Perspective,* Bulletin for International Fiscal Documentation, IBFD, 501-506, 2006; L.Cerioni, *The Never-Ending Issue of Cross-Border Losses Compensation within the EU: Reconciling Balanced Allocation of Taxing Rights and Cross-Border Ability-to-Pay,* 24 EC Tax Review 5, 268-280, at 277.

Cooperation Directive[31] - even in case of underreporting by the concerned taxpayer. In the case of worldwide taxation by the residence State, its taxing power would seem to qualify even this State as "Member State of activity" together with source States.

As a matter of fact, several States, within the EU, apply worldwide taxation with foreign tax credit for resident individuals. Consequently, one could argue that, if in all cases potentially involving these jurisdictions, the proportional granting of personal deductions were to be replaced by the granting of full deductions by the residence State alone, there would be, *de facto*, a significant limit to the outcome reached in *X* (fractional taxation of cross-border income and fractional granting of deductions). Although it could be noted that, in these situations, due to the residence State's ability to grant the personal deductions at issue, there would be no discrimination, in terms of tax revenues of Member States there may well be implications which would further contrast with the interest of Member States and, ultimately, contrast with the *rationale* behind the CJEU's consistent approach of not requiring a residence State where a taxpayer has no (or insufficient) taxable income to grant the tax advantages (an approach without which such residence State would obviously suffer revenue losses).

In fact, the full granting of deductions by the residence State alone could even – in some specific cases - be detrimental to the tax revenues of the residence Member State *if* the foreign tax credit that this State would need to grant for tax paid in the source States, were able, on its own, to offset the additional revenues generated by taxable foreign income. This could be the case *if* taxation in the source State were either equal or higher than in the residence State. In this scenario, the taxable base and tax revenues would be shifted from the residence State to the source States where the activity were to be carried out, as this latter would grant no deduction, despite having taxing powers under Art. 14 (or under Art. 15) of DTCs. Conversely, the tax base would be shifted in favour of the residence State if this last State, despite applying worldwide taxation, were to grant only the fraction of the personal deductions corresponding to the fraction of income actually earned there, but in this case there would be an overassessment of the ability to pay in the residence State, which overassessment would find a justification neither in X nor in *Imfeld and Garcet* nor in *De Groot*.

Additionally, a practical consequence of the full granting of personal advantages by the residence State alone, in a context of considerable differences between the effective tax rates in the various State, may consist of an incentive, for those taxpayers who find themselves in situations where they can easily move the connecting factors for tax residence, to engage in tax-shopping practices (aimed at maximising the overall amount of deductions against the overall gross amount of income), i.e. to implement forms of international tax avoidance, just after the EU, following the OECD's BEPS initiative, has introduced measures to fight cross-border tax avoidance when implemented by multinational companies[32].

For these reasons, a general response to the first issue (whether the residence State, if applying the worldwide taxation, should grant full deductions or proportional deductions) would seem to be difficult to draw, because both the full granting of deductions and the proportional granting of deductions would risk generating outcomes contrasting with a proper assessment of the ability to pay and with the interest of Member States' revenues.

Moreover, the CJEU's wording leaves completely open the issue as to whether, in the event of tax residence conflict between two (or more) of the concerned jurisdictions, the proportional *pro-*

[31] Directive 2011/16 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC [2011] OJ L 64/1, Art. 8 (1).
[32] E.g., Council Directive 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (Anti-Tax Avoidance Directive).

quota granting of personal deductions would still apply. The issue could be really important because, where an individual taxpayer carries out a professional activity in a Member States and, for performing this activity, remains in the country over 183 days during a tax year, under the national tax legislation the taxpayer generally becomes tax resident in the country at stake, whilst keeping the tax residence under the tax law of its jurisdiction of origin too, if he maintains links there. In this situation, the tie-breaker rules under Art. 4(2) of DTCs based on the OECD Model would apply and would need to be used to allocate the tax residence to only one of the jurisdictions, but, in case of different national interpretations of the tie-breaker rules which take priority over the nationality criteria in the hierarchical order of criteria laid down by Art. 4(2), the double tax residence situation risks remaining unaltered, unless the taxpayer can rely on a mandatory arbitration clause in the provisions governing the mutual agreement procedure (MAP) of the specific DTC. Until the tax residence conflict is solved, if both jurisdictions apply the worldwide taxation principle and do not exempt foreign income related to professional activity (or to employment), the taxpayer at stake can find himself subject to worldwide taxation in both countries and may need to require foreign tax credit relief in both of them, for the tax paid in the other jurisdictions.

In this case, even if the definition of "Member State of activity" given by the CJEU in *X*, due to its being determined by taxing powers of the jurisdictions concerned, were to imply the proportional granting by both States, the proportional granting itself would risk placing the taxpayer in a position where he enjoys the *full* tax deductions in *neither* of the two States whilst being subject to unlimited taxation in both of them, which would defeat one of the two key ultimate objectives pursued by the CJEU. The taxpayer would need to avoid both this situation, and a situation where one of the countries would grant no deductions despite applying worldwide taxation (which situation would create a disadvantage for the taxpayer exercising a fundamental freedom in comparison with taxpayers carrying out their activity only in a domestic jurisdiction).

To do so, the taxpayer – due to its being subject to worldwide taxation in both countries pending the tax residence conflict, and due to the tax residence conflict preventing even any allocation of the power to grant deductions between *residence* state and source state – would need to be allowed to enjoy *full deductions* in both countries for all period during which he is subject to worldwide taxation in both. Nevertheless, the full deductions in both countries would risk jeopardizing another objective accepted by the CJEU, i.e. the *accumulation of tax advantages*.

Accordingly, it is evident that – particularly in situations of tax residence conflict – only the overcoming of worldwide taxation and its replacement with a "model" consisting of fractional taxation of the overall income in each country coupled with fractional granting of personal deductions, can ensure the achievement of both objectives indicated by the CJEU in *X*. Should this "model" be accepted, which would, in essence, lead to a European principle of ability-to-pay, this step would ultimately mark the introduction, for individuals, of a scheme equivalent to what the re-proposed common consolidated corporate tax base (CCCTB) scheme would be for companies, and this outcome would be fully consistent with the inclusion of both companies and individuals within the scope of the freedom of establishment (whose infringement was at stake in *X*) under Art. 49 and 54 of the TFEU.

Conclusions

In *X*, the CJEU has arguably paved the way to the development of an EU law principle of ability-to-pay, based on the fractional taxation of the overall income by each Member State (in proportion to its share of the taxpayer's global income) and on the corresponding fractional granting of tax advantages, but it had limited its scope, by indicating it as a solution to overcome situations of discrimination arising out of the risk of taxpayers not being fully granted personal deductions.

Whereas this first move towards the development of this principle undoubtedly marks a step forward, in comparison with previous rulings, in allowing a proper cross-border assessment of the ability-to-pay of individual taxpayers earning incomes in two or more Member States, the potential non-matching between fractional taxation and fractional deductions where the Member State of residence adopts the worldwide taxation principle, and/ or in situations where only a restriction – not a discrimination – is at stake, may indicate that the ruling has not really overcome the risk of outcomes such as those in *De Groot* and in *Imfeld and Garcet*. In fact, the *limitation* of the scope of the ruling may indicate that, outside the cases of discrimination, the potential developing the "model" consisting of fractional taxation coupled with fractional deduction has been even stopped, and, from this perspective, the ruling would risk marking a step backward. This would be so because the dual goal that the CJEU indicated, i.e. the reconciliation between the prevention of accumulation of tax advantages and the need to ensure that the taxpayer benefit from the full deductions, would deserve to be pursued in *all* situations, and the fractional taxation coupled with fractional deduction would be the most effective way of achieving this outcome.

Consequently, it would ideally be for the EU legislator, following the *X* ruling, to introduce a general harmonising EU measure intended to overcome worldwide taxation by the residence State when its taxpayers accrue incomes in other Member States and to introduce this "model", to the benefit – ultimately – both of legal certainty for taxpayers and of the tax bases of Member States themselves.